86-635

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. _____

WILLIAM HOGUE ..... *Petitioner*

vs.

BILL CLINTON, GOVERNOR OF STATE OF ARKANSAS; KENNETH WHITLOCK; BARRETT TOAN; GAIL HUECKER; RAY SCOTT AND CURTIS IVERY, IN THEIR CAPACITY AS EMPLOYEES OF THE DEPARTMENT OF HUMAN SERVICES OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THORP THOMAS
Counsel of Record
THORP THOMAS, P.A.
112 WEST "F" STREET
NORTH LITTLE ROCK, ARKANSAS 72116
(501) 376-3377

BOB SCOTT
1611 NORTH MAIN STREET
NORTH LITTLE ROCK, ARKANSAS 72116
(501) 375-3236

Attorneys for Petitioner

ARKANSAS LEGISLATIVE DIGEST, INC.

69 pp

QUESTION PRESENTED

Whether a court of appeals may ignore the mandates of Federal Rule of Civil Procedure 52(a) and *Anderson* v. *City of Bessemer, North Carolina*, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), and superimpose its judgment on questions of fact in a wrongful discharge action, over the trial court sitting as a jury and, in effect, try the case *de novo* on appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, William Hogue, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 27, 1986.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas, reported at 605 F. Supp. 1288 (1985), the opinion of the United States Court of Appeals for the Eighth Circuit (unreported to date), and the dissenting opinion of Chief Judge Lay (unreported to date) are reprinted as Appendices A, B and C respectively.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit filed its opinion and entered its judgment on May 27, 1986. A timely petition for rehearing was denied, without opinion, on July 15, 1985. This petition for a writ of certiorari is being filed within 90 days of that date. A copy of the Order denying the petition for rehearing is printed as Appendix D to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(3).

STATUTORY PROVISIONS INVOLVED

Title 42 of the United States Code at Section 1983 provides in relevant part:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any state . . . subject or causes to be subject, any citizens of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, William Hogue was employed from September 1, 1962, until October 10, 1980, by an agency of the State of Arkansas known as the Division of Social Services of the Department of Human Services. Hogue was terminated twenty-three months before he would have been eligible for retirement with full benefits under the Plan provided by the State of Arkansas. Hogue's position at the time of termination was Director of the Scott County Office of Social Services.

In the summer of 1980, W. A. Tudor, the Director of Investigations-Medicaid Fraud for the Division of Social Services received a letter which alleged wrongdoing by Hogue from the parents of a "welfare client" of Hogue's Scott County Office. Tudor's investigator, Chuck Milburn, traced the letter back to its source. The trail led from State Senatorial candidate Gene Rainwater, who believed Hogue was working against his (Rainwater's) election; to State Representative Bud Rice; to Glenda Owens, a disgruntled former employee of Hogue, who then worked in a Social Services office in another county.

On August 11, 1980, Tudor reported to Barrett Toan, Commissioner of the Division of Social Services. Tudor submitted a letter containing twelve allegations of wrongdoing to Toan, which are set out in the District Court's Opinion at App. #1 in App. "A". Tudor was instructed to investigate further. He submitted his report to Toan on August 25, 1980. The report contains nineteen generalized allegations of wrongdoing, which are set forth at App. #2 at App. A. Hogue was not given *any* specific information about the substance of the allegations until January 8, 1985, six calendar days prior to the trial in the District Court, due to the Respondents' claim that the investigative reports contained confidential information about "welfare clients' " cases. Counsel for petitioner received a stack of photocopied matter,

three and one-half inches high, purporting to be the investigative report, which was duplicative and disorganized.

Hogue was terminated September 2, 1980, for cause by Toan, by letter (App. E) which stated the termination was "under the authority of Arkansas Statutes Annotated, Section 83-107 (App. 6) for cause as is necessary for the efficient performance of duties prescribed under the Public Welfare Act." Hogue was reinstated by Gail S. Huecker, Director of the Department of Human Services on September 30, 1980, and advised that he was "guaranteed your due process rights will be protected during this determination period." The "determination period" referred to was seven days, during which time Toan was to make a "final determination," ostensibly under Ark. Stat. Ann. §83-107. On October 2, 1980, a meeting was held in Toan's office with Hogue, which the District Court found (App. #3 at App. A) and the Eighth Circuit affirmed (App. #1 at App. B) did not constitute a hearing on Hogue's termination.

The next attempt at a hearing on the termination was held on October 29, 1980. The District Court found (App. #3 at App. A) and the 8th Circuit affirmed (App. #1 at App. B) that this second gathering did not constitute a hearing. At the meeting, Hogue, essentially, was asked what was his defense to the nineteen vague allegations of misconduct, and the "hearing" ended. Toan's termination was upheld by Ray Robinson, Deputy Director of the Department of Human Services. In Robinson's letter to Hogue, he was advised that he had "the right to appeal to the Arkansas Merit Council under their rules and regulations." With the Merit Council appeal pending, the state enabling statute creating the Council was declared by a state court to be an unconstitutional delegation of legislative authority; a decision affirmed by the Arkansas Supreme Court in the consolidated cases of *Patton et al* v. *Ragland* and *Charles* v. *Gordon, et al.*, 282 Ark. 231, 668 S.W.2d 3 (1984).

By letter of August 12, 1983, Hogue was advised that his internal appeal was exhausted, and that he had been fired *for cause*, under Ark. Stat. Ann. §83-107 (Repl. 1976). The letter was written by Dr. Curtis L. Ivery, then Commissioner of the Division of Social Services, who advised "it seems that your only alternative is to initiate civil litigation."

Petitioner brought an action under 42 U.S.C. §1983 alleging that his discharge deprived him of liberty and property interests without due process of law. The case was tried on January 14 and 15, 1985. The District Court held that Hogue had a property interest in continued employment by applicable personnel rules and regulations titled: "The Policies and Procedures On Employee Grievance of the Department of Human Services." The 8th Circuit Court of Appeals reversed the District Court by finding as a matter of law in Arkansas, an employee is generally terminable at will.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit Court of Appeals failed to follow the Federal Rules of Civil Procedure, its previous decisions on the "property interest" issue and failed to follow the mandates of this Court for determining whether such an interest exists.

The Eighth Circuit held:

> "In Arkansas an employee is generally terminable at will in the absence of an employment contract for a fixed term. *Griffin* v. *Erickson*, 277 Ark. 433, ___ , 642 S.W.2d 308, 310 (Ark. 1982). That the employment is public rather than private does not alter the "at will" status of the employment, nor does a provision in the employment contract that an employee will not be discharged except for good cause."

Petitioner refers to the above-quoted standard as the "general rule." The court ignored its own decisions and the decisions of this Court by failing to go forward to one exception to the "general rule," which petitioner refers to as "practice and procedure." This "practice and procedure" exception is stated by the 8th Circuit as follows:

> A plaintiff may alternatively establish a property interest by showing "mutually explicit understanding" or common practices and agreements derived from the employer-employee relationship which would create a sufficient expectancy of continued employment to merit some due process. *Perry* v. *Sindermann*, 408 U.S. 593, 600-603, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972); *Kyles* v. *Eastern Nebraska Human Services*, 632 F.2d 57, 60-61 (8th Cir. 1980).

Brockell v. *Norton*, 688 F.2d 588 (8th Cir. 1982).

The District Court found from the evidence that Hogue had a sufficient expectation of continued employment. The 8th Circuit disagreed:

> We disagree with the district court that the Grievance Policies and Procedures, coupled with the provisions of Act 693 of 1981 providing an appeal before the Merit System Council, conferred a "sufficient expectancy of continued employment" upon Hogue to require a pretermination due process hearing. Grievance procedures that do not establish any grounds upon which termination must be based do not in themselves create a property interest in employment. *Zeigler* v. *Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). *See also Cato* v. *Collins*, 539 F.2d 656, 660-61 (8th Cir. 1976) (Arkansas statutes outlining procedures, including the right to a hearing, for terminating teacher's employment create no expectancy of continued employment).

The 8th Circuit has substituted its judgment for that of the district court, without finding that the district court's decision was clearly erroneous, in violation of F.R.C.P. 52(a) which states in pertinent part "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. (*See Mayor of the City of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 622 n. 20, 94 S.Ct. 1323, 39 L.Ed.2d 630 [1975].) The court of appeals also violated the standards set forth by this Court: "(A) finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighted the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice

between them cannot be clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 94 L.Ed. 150 (1949); see also *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

Anderson v. *City of Bessemer, North Carolina*, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Whether "practices and procedures" provide an exception to the "general rule" is a factual inquiry, which the district court concluded "clearly" provided Hogue with a property interest.

The district court also had before it: (1) Hogue's eighteen year tenure with the agency; (2) Commissioner Toan's letter of September 2, 1980 by which Hogue was informed his termination was pursuant to Ark. Stat. Ann. Section 83-107 (Repl. 1976) (termination for cause); (3) Heucker's letter guaranteeing Hogue his appeal *rights* and (4) Ivery's letter concluding that Hogue was terminated *for cause*.[1] The circuit court of appeals clearly has substituted its judgment on a finding of fact for that of the district court, contrary to this Court's decisions, above-quoted.[2]

---

[1]Note that under Ark. Stat. Ann. Section 83-107 (Repl. 1976), the Commissioner of Social Services has the final authority on employee terminations. The final termination decision was made by Ivery, then Commissioner, pursuant to that Statute.

[2]In their Reply Brief to the circuit court of appeals, Appellants/Respondents state that Ark. Stat. Ann. §83-107 (Repl. 1976) has been superceded by the later Ark. Stat. Ann. §5-912 (Repl. 1976), (Appl. H) which states: "All other personnel . . . shall be employed by and serve at the pleasure of the Director (of Human Services). While having no opportunity to brief this argument (raised for the first time in Appellant's Reply Brief), the facts in this case show clearly and by specific reference that the "practice and procedure" of Respondents was to terminate for cause under Ark. Stat. Ann. §83-107 (Repl. 1976). Additionally, such an issue should not have been considered by the court of appeals, as it was raised for the first time on appeal. *Grief Bros. Cooperage Corp.* v. *United States Gypsum Co.*, 341 F.2d 167 (1965). Respondents also ignore the statutory language of Ark. Stat. Ann. §5-912 which states that "nothing in this act shall be so construed as to reduce any right which an employee of the Department of Social and Rehabilitative Services (Human Services) shall have under any civil service or merit system."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THORP THOMAS
Counsel of Record
THORP THOMAS, P.A.
112 WEST "F" STREET
NORTH LITTLE ROCK, ARKANSAS 72116
(501) 376-3377

BOB SCOTT
1611 NORTH MAIN STREET
NORTH LITTLE ROCK, ARKANSAS 72116
(501) 375-3236
Attorneys for Petitioner

Dated: October 14, 1986

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

William Hogue *Plaintiff*

v. Civil No. 83-2257

Bill Clinton, Governor of
The State of Arkansas et al *Defendants*

MEMORANDUM OPINION

Plaintiff, William Hogue, from September 1, 1962, until his termination on October 10, 1980, was employed by an agency of the State of Arkansas now known as the State Department of Human Services. For a number of years prior to his termination, Hogue was the director of the Scott County Office of Social Services located in Waldron, Arkansas. His office was responsible for administering a number of the social services provided by the agency, commonly known as "welfare."

During the summer of 1980, before the Democrat preferential primary had been held, Senator W. E. (Gene) Rainwater received from Bud Rice, a state representative from the Waldron area, a letter that he had received from Jackie and Edith Wright, grandparents of a minor child. The letter was introduced as Defendants' Exhibit 7 and will be referred to as the "Wright" letter. The letter alleges certain wrongdoing in relation to the providing of certain welfare services to the mother of the minor child.

For some reason which is still unexplained, even though

Senator Rainwater and Representative Rice testified, upon receipt of the letter by Rice from the Wrights, rather than handling the matter himself, he forwarded it to Senator Rainwater who, the evidence reflects, was locked in a political race which he later lost. Upon receipt of the Wright letter, Rainwater forwarded it to W. A. Tudor, a retired major with the Arkansas State Police who was then Director of Investigations-Medicaid Fraud.

After the letter was received by Tudor, he assigned Investigator Charles Milburn to investigate the allegations.

Since the letter had come from Senator Rainwater, Milburn, after first journeying to Waldron in a futile attempt to locate the Wrights, proceeded to Greenwood to discuss the matter with Senator Rainwater. Strangely, he was advised by Senator Rainwater that he knew nothing about the case and that he had simply received the letter from Representative Rice. Senator Rainwater apparently did not tell Milburn at the time that Rice was also a state legislator, but merely referred to him as the owner of a furniture store in Waldron.

Upon returning to Waldron, Milburn attempted to discuss the matter with Rice, but was advised by Rice that he knew nothing about the matter, and he referred him to Glenda Owens, an employee of the Waldron Social Services Office. During his testimony, Rice, when asked why he sent the letter to Rainwater, stated that he merely wanted to keep him advised. The court concludes that the circumstances in relation to the letter, and the "run-around" that Milburn received, lends credence to Hogue's contention that this matter was instituted by Rainwater because Rainwater believed that Hogue was supporting his opponent. That aspect of the case will be discussed in more detail below.

Still not knowing of Mr. Rice's position as a state

legislator, Milburn used, for a brief period of time, Rice's business establishment as a headquarters out of which he conducted his investigation. He interviewed Glenda Owens, who claimed that Hogue was aware of the Wright situation and that numerous other instances of improper handling of claims had occurred in the Waldron office.

Milburn then interviewed Clyde Hawkins, one of the witnesses listed in the Wright letter. Hawkins was a former County Judge and Sheriff of Scott County, and he claimed that he was aware of irregularities in the running of the office in Waldron by Hogue.

At this point, Milburn reported to Tudor by telephone, and Milburn then learned for the first time that Rice was a state legislator. Tudor recognized the possible political implications of the investigation and directed that Milburn cease using the Rice business establishment as the base of his operations. He directed Milburn to return to Little Rock and the alleged irregularities were reported to Barrett Toan, Commissioner of the Division of Social Services of the Department of Human Services. The report to Toan was in writing, dated August 11, 1980, and was introduced as Defendants' Exhibit 8. In the report to Toan, allegations of numerous irregularities in the running of the Waldron office were reported. Among these were:

#1

a. That Hogue certified clients for assistance that were not entitled to it, and directed other employees to do so;

b. That he allowed Peggy Keener, active in the campaign to elect Governor Bill Clinton, access to the confidential food stamp files, and provided her blank application forms for assistance and encouraged her

to submit applications in behalf of persons in the county;

c. That Hogue instructed employees to certify, without question, all applications submitted by Ms. Keener, advising them that Ms. Keener had verified the information and that it was unnecessary for them to do so;

d. That he instructed AFDC clients not to turn in child support money until told to by him;

e. That he instructed employees to leave out of the applications certain information that would make the particular person applying ineligible for assistance, and modified and caused caseworkers to modify information submitted by clients so that they would be eligible for benefits;

f. He instructed caseworkers to certify every client that they see because he did not want any pending cases;

g. That he does not require verification to certify clients, and that, in some instances, the information was verified after the case had been certified;

h. That he was involved in politics in violation of the rules of the agency and of state law;

i. That he instructed certain employees to follow and surveil other employees and report to him in relation to their off-duty personal contacts;

j. That, during previous elections, several clients discussed with Clyde Hawkins, former County Judge and County Sheriff, Hogue's threat to them that if they did not vote Hogue's way, he would close their welfare cases;

k. That he instructed employees of the office to give clients more deductions than they were eligible for;

l. That he intimidated employees by telling them that

he "had the Commissioner in his pocket."

After receiving the report, Toan directed that Tudor and his employees interview each employee and former employee of the Waldron office. In compliance with this order, Tudor prepared an outline for the investigators to use and each employee and former employee was interviewed. During the interview, investigators often identified themselves to the persons being interviewed as being with the Fraud Division, and it was general knowledge in the community that Hogue was under investigation for "fraud." During the course of the investigation, Hogue asked Tudor about the investigation, but he was not given any specifics in relation to the allegations.

After the interviews were completed, Tudor reported to Toan by a report dated August 25, 1980 (Defendants' Ex. 9). The cover letter to that report lists 19 alleged violations or irregularities in the running of the office, summarized as follows:

#2

1. Instructs employees to violate policy to certify clients for assistance and issue food stamps.
2. Instructed AFDC clients to keep child support monies and utilize for other needs.
3. Interferes with the work of other agencies, causing some alienation.
4. Combining Social Service business with politics.
5. Demoralizing employees.
6. Utilizing office employees, state equipment and state materials in a political campaign.
7. Instructing the food stamp issuance officer to violate policy.

8. Instructing employee to utilize State time, equipment, and materials to prepare letters for private individuals.
9. Harassing an employee in front of the entire County Staff and visiting employees.
10. Instructing an employee to withhold a certain portion of service records requested by the Central Office.
11. Violation of policy during handling of child abuse incidents.
12. Committing conduct alienating other County Directors.
13. Violation of policy relative to foster homes.
14. Interfering with the ongoing investigation of Mr. Hogue's activities in Scott County.
15. Refusing to take action on possible fraudulent overpayments called to his attention.
16. Spends hours each week visiting in the office with Peggy Keener and permitting her free access to the entire building.
17. Permitting Peggy Keener access to the food stamp files.
18. Encouraging or threatening welfare clients to vote for Mr. Hogue's candidate.
19. Violating policy relative to voluntary medical travel.

The report describes the investigation conducted by Tudor's office in relation to each of these charges, and contains voluminous exhibits in relation thereto.

As a result of the investigation, by letter dated September 2, 1980, Commissioner Toan notified Hogue that he was terminated as of September 2, 1980. The letter describes, in general terms only, the allegations set forth in the August 25,

1980, report, and, again, gives Hogue no specific information in relation to the charges made.

By letter dated September 29, 1980 (Plaintiff's Ex. 17), Gail S. Huecker, Executive Director of the Arkansas Department of Human Services, advised Hogue that "I am overturning Commissioner Toan's decision on your termination of employment." The letter goes on to advise him that effective September 30, 1980, he was reinstated with back pay and placed on administrative leave pending further action. She advises that Commissioner Toan will have seven days "to make final determination as to whether action will be taken or he will place you back into active employment." The letter ends by advising Hogue that he is "guaranteed your due process rights will be protected during this determination period."

On approximately October 2, 1980, what was referred to by some of the state employees as a hearing was held in Toan's office with Hogue present. There was no record made and it is impossible to determine from the evidence adduced at the trial the nature of the meeting. The court is convinced that the meeting could not be considered to be a "hearing" in the sense that that word is used in relation to the protection of due process rights. Instead, the testimony indicates that Hogue was given the general allegations already referred to, with little, if any, specifics being made available to him, such as the names of the persons making the charges and the exact nature of the allegations made. He was told that every caseworker in his office had said, when interviewed, that he had told them to ignore standards for providing assistance to clients, but the specific allegations were not attributed to any particular employees. Kenny Whitlock, Director of Program Operations at the time, testified that he attended the meeting and that Hogue was not given the names of the clients involved, or the names of the employees complaining. He says that he wa told of the nature of the charges, in general. Plaintiff's Exhibit 11

are notes which Whitlock used to conduct the meeting. There is dispute about whether these notes were made available to Hogue. Whitlock says that he does not know whether the notes were given to Hogue, and Debbie Nye, an attorney for Human Services, testified that Hogue did receive them. Hogue says that he did not. In any event, a mere reading of Plaintiff's Exhibit 11 shows that it, again, lists the allegations made in general terms only, and does not disclose sufficient information for Hogue to have refuted any of the charges made at this meeting. In this respect, Witness Nye testified that the names of the clients were not disclosed because that would breach the confidential relationship that was supposed to exist between clients and others. The court notes, in passing, that there was apparently no one present in the meeting who did not know or could not have determined the names of each and every client of the Waldron office.

#3

Be that as it may, it is apparent that the October 2, 1980, "meeting" was nothing more than that and was not a "hearing" in any reasonable sense of that word.

What was apparently intended to be a hearing was held on October 29, 1980, in the offices of Director Ray Robinson. The hearing was reported by a court reporter and the transcript of the hearing was received as Defendants' Exhibit 6. It becomes evident from a reading of this transcript that the hearing proceeded without Hogue or his attorney being provided with any information about the charges other than the general information described above. The hearing that was conducted is best described in Director Robinson's opening comments:

> Okay. I have got this letter dated 1 October, by registered mail, from you, George Jernigan, stating that you are appealing Mr. Hogue's case when the Commissioner

> relieved him of his duties and claims that he gave him due process. From there, the only correspondence I have is from Barrett Toan to Mr. Hogue, dated 7 October, that did tell him he was relieved of his duties and a terminated employee of the Division of Social Services, and telling him that he had the right to appeal, which you, in your letter, have done. So, there. I'll leave it to you to start your case.

Mr. George Jernigan, Hogue's attorney at the hearing, then described in some detail his attempt to determine with some specificity the allegations made against his client. For example, Jernigan introduced a letter from his office dated September 5, 1980, addressed to Commissioner Toan, requesting, among other things, "statements, exhibits and evidence of any sort upon which Mr. Hogue's dismissal was based, and asking that he "identify certain people who made statements upon which Commissioner Toan based his dismissal of Mr. Hogue in the broad, general statements." (P. 5 of transcript.) Then at p. 7 Jernigan stated that his client had been dismissed by Commissioner Toan "without any information as to the grounds or basis of his dismissal and without any opportunity to discuss the charges against him, and to present his side of the story without any information as to any specifics of any of the allegations against him."

In spite of these claims made by Hogue's attorney at the hearing, no attempt was made by either Director Robinson or the attorney representing the department, Debbie Nye, to inform Hogue, with any degree of specificity, the nature of the charges against him and the names of the persons making them. The hearing then consisted primarily of Jernigan introducing into the record various affidavits that had been prepared, with some questions asked of the persons who presented the affidavits. In addition, Hogue testified and during his testimony he stated unequivocally, under oath, that

at no stage during the investigation was he provided with "any facts, any specifics, any statements, any specific evidence as to why" he was being dismissed. He testified:

> Q. As of today, 75 days after the investigation started, and 60 days after you were fired, have you seen one specific statement or any specific charges or any evidence as to why you have been dismissed?
>
> A. No.

Although the Department of Human Services was represented by counsel, no attempt was made to refute in any way the allegations of Hogue that he had not been provided with the reasons for his dismissal other than in the broad general terms contained in the letters which are in evidence. After Hogue's testimony, Ms. Nye declined to call any witnesses, and the hearing was adjourned.

In a letter dated November 3, 1980 (Plaintiff's Ex. 18), Hogue was advised by Ray A. Robinson, Deputy Director, that "I will uphold Commissioner Toan's decision to terminate your employment and not reinstate back pay." The letter goes on to advise Hogue that if he did not agree with the decision made, he had "the rightd to appeal to the Arkansas Merit Council under their rules and regulations." The reference in the letter to the Arkansas Merit Council was in respect to an appeal procedure established for state employees by Act 693 of 1981 (Ark. Stat. Ann. §§12-3901 *et seq.*) (Supp. 1983). From the date of Robinson's letter to February 9, 1981, the parties proceeded to prepare the matter for the hearing contemplated by Act 693. Plaintiff's Exhibits 13, 14 and 15 are examples of the pre-hearing matters that transpired.

When the parties and their attorneys appeared for the hearing on February 9, 1981, all agreed that it was inadvisable

to hold the hearing because of a ruling by the Pulaski Circuit Court, Third Division, that Act 693 was unconstitutionally vague and unlawfully delegated legislative authority to the Arkansas Merit System Council Board established by the act. All agreed that the hearing would be delayed until the Arkansas Supreme Court acted in relation to that decision. On April 16, 1984, in the consolidated cases of *Patton, et al.* v. *Ragland* and *Charles* v. *Gordon, et al.*, 282 Ark. 231 (1984), the Arkansas Supreme Court affirmed the trial court's finding that the act was unconstitutional, and, for all practical purposes, the Arkansas Merit System Council Board and the appeals provided by the act to state employees were abolished.

By letter dated August 12, 1983, Hogue was advised by Curtis L. Ivery, then Commissioner of the Arkansas Department of Human Services, Division of Social Services, that, in effect, the termination of Hogue would not be reviewed and that the Division would not "take any further action regarding your termination." The letter advises Hogue that, in light of the recent court ruling, "your internal appeal of this matter is officially exhausted," and that if he desired to pursue the matter, "it seems that your only alternative is to initiate civil litigation." This suit was filed on September 9, 1983, alleging that plaintiff was deprived of both liberty and property without due process of law. The court has jurisdiction under the provisions of 28 U.S.C. §1983 and 28 U.S.C. §§1343(3) and (4).

The case was tried to the court on January 14 and 15, 1985. At the conclusion of the evidence, the court announced, on the record, that it would rule, based on the evidence that it had heard, that plaintiff was entitled to a due process hearing before his termination both because he had a property interest in his employment and because stigmatizing reasons were given during the course of his termination. The court took under advisement the question of whether Hogue's First

Amendment rights had been violated because, as he claimed, he was terminated because he refused to aid Senator Rainwater in his re-election campaign. The court asked for briefs from the attorneys on the issue of the remedy to be afforded Hogue. At that time, the court advised that it would make specific findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure. The facts set forth in this opinion shall be considered the court's findings of fact.

Plaintiff alleged in his complaint, and contended at the trial, that:

a. He was terminated, in violation of his First Amendment rights, because of his refusal to aid Senator Rainwater in his re-election campaign;

b. The reasons given for his termination at the time were stigmatizing and that, thus, he was denied liberty without due process of law in that he was not provided a name clearing hearing prior to his termination;

c. He was denied property without due process of law in that he had a property right to his job and was not provided a hearing prior to termination.

The court will discuss these issues in the order listed.

Political Issue.

There are three circumstances which are at least arguably applicable to this case in which the United States Supreme Court has found that a public employee is entitled to a hearing prior to termination. One of these is where the circumstances show that the employee was terminated because of his political association in violation of his free speech rights granted by the First Amendment to the United States Constitution. *Elrod* v.

Burns, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980).

As the court has already indicated, there is evidence from which a trier of fact could conclude that more than one of the "actors" in this controversy were "playing politics," at least to some extent. Based on the evidence adduced, the court believes that, more than likely, William Hogue, like many state employees in his position, especially in rural counties such as Scott County, at least on occasion, and perhaps more often, used his position to aid the political candidates of his choice. Likewise, it appears that, more than likely, Senator Rainwater and Representative Rice and other politicians in the county knew that this had occurred, but none of those individuals became particularly concerned about it until Rice and Rainwater, and probably other local politicians, came to believe that Hogue might be, in this particular election, supporting Patton, Rainwater's opponent — thus, the Wright letter. The court believes that it is significant that, although the Wright letter was apparently submitted to Representative Rice, he forwarded it to Senator Rainwater in Greenwood, several miles away. Attached to the letter introduced as Defendants' Exhibit 7 is the envelope in which the Wright letter was mailed to Mr. Tudor, and it contains Senator Rainwater's return address, with the Arkansas Senate designation and the seal of the state.

As already indicated, the court feels that it is "strange" to say the least that when Investigator Milburn contacted Rainwater, he professed to know nothing about the letter and sent Milburn back to Rice. Whereupon, Rice professed to know little if anything about it, and referred him to someone else. It is also significant, in the court's view, that Rainwater merely identified Rice as an owner of a furniture store in Waldron, and did not disclose to the investigator that he was also a state legislator.

In addition, the evidence indicates that Peggy Keener,

active in the 1980 campaign of Governor Clinton, was given free access to the office and access to view and use records containing the names of persons receiving assistance and other confidential information. The implication is strong, and perhaps it is more than an implication, that this information was being used for political purposes. In addition, one or more of the persons interviewed by Tudor's staff claimed that Hogue and Keener used the office and office personnel to prepare and distribute certain purely political documents such as an invitation to a fish fry to be held to raise money in the political campaign in which Ms. Keener was interested.

However, even though the court believes that the evidence is ample from which it could find that several people were "playing politics" with the Waldron office, the court finds that, although the investigation was probably started because of a political feud, there is absolutely no basis for saying that Hogue was terminated because he refused to support any particular candidate or because of any other political association. The court was impressed with the testimony of Mr. Tudor and believes that he and his employees conducted a thorough, professional investigation not affected in any way by political considerations. He did his job, and in the court's view, did it well, and then turned the results of his investigation over to proper authorities.

Likewise, the court can find no evidence in the record that any of the persons who directly participated in Hogue's dismissal were impelled to any degree by political considerations.

In short, the court believes that, more than likely, the investigation was initiated by Rainwater and Rice, and other political figures in the county, through the furnishing of the Wright letter and other information, but that the persons conducting the investigation and responsible for the dismissal did not act for political reasons. Thus, the court find that

plaintiff Hogue has failed to prove by a preponderance of the evidence that his First Amendment rights to free speech were violated through a dismissal because of his political associations or refusal to aid a particular political candidate.

Right to Name-Clearing Hearing.

Another circumstance in which the United States Supreme Court has held that a hearing is necessary before termination is where the circumstances of the dismissal are such that a "liberty interest" is violated. In order to fall within the prohibition of the due process clause, the employee must suffer some deprivation of liberty at the hands of the governmental employer other than loss of employment itself. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); and *Codd* v. *Velger*, 429 U.S. 624 (1977). The Supreme Court has held that mere injury to reputation alone does not constitute a deprivation of liberty. *Paul* v. *Davis*, 424 U.S. 693 (1976).

However, where an employee is discharged under circumstances which created a stigma which forecloses freedom and ability to seek other employment, a hearing is necessary. In *Board of Regents* v. *Roth*, the Supreme Court seemed to say that where the employer publicly disseminates a charge against the employee which might seriously damage his standing and association in the community, a protected liberty interest may be triggered. *Roth, supra*, 408 U.S. at 573. In *Paul* v. *Davis, supra*, the Supreme Court seemed to narrow the rather broad language of *Roth* and *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). In those cases, the court set forth the prerequisites of an actionable procedural due process violation. There must be "one" defamation, and "two" the defamation has to occur in the course of the termination of employment. *Paul* v. *Davis, supra*, 424 U.S. at 710, and *Harnett* v. *Ulett*, 466 F.2d 113 (8th Cir. 1972).

However, the Court of Appeals for the Eighth Circuit, the court whose decisions are binding on this court, has construed *Carey* v. *Piphus*, 435 U.S. 247 (1978), in such a way that the mere failure to provide a due process hearing prior to termination may be actionable even if such hearing would have accomplished nothing because the charges were true and, thus, the terminated employees could not have cleared their names even if a name-clearing hearing had been afforded. In a case out of this court, *Pollock* v. *Baxter Manor Nursing Home*, 536 F. Supp. 673 (W.D. Ark. 1982), this court found that although a name-clearing hearing was not provided the terminated employee, she was not harmed because the charges made at the time of her termination were true. A panel of the Court of Appeals for the Eighth Circuit, consisting of Judges Henley, Ross and McMillian, in 706 F.2d 236, affirmed, holding that "we agree that under the facts of this case, Pollock does not prevail because a liberty interest does not arise unless an employer disseminates a false and defamatory statement." Judge McMillian wrote a dissenting opinion in that phase of the case.

Then, on rehearing, the same panel, with Judge Henley dissenting, "changed its mind" and, essentially, adopted the position of Judge McMillian in his earlier dissenting opinion.

In that decision, at 546, the court of appeals framed the issue as follows:

> A fundamental purpose of the due process clause is to allow the aggrieved party the opportunity to present his case and have its merits fairly judged. *Logan* v. *Zimmerman Brush Co.*, 445 U.S. 422 (1981). Pollock was not given such an opportunity. Thus, the issue becomes whether Pollock is entitled to damages to remedy the lack of due process afforded her by the nursing home.

The court of appeals then answered the question that it asked:

> It is clear that the court in *Carey* determined that a plaintiff is still entitled to nominal damages for failure to hold a due process hearing even if it is shown that the stigmatizing information is true. In the instant case, the nursing home refused to conduct a due process hearing and thereby violated Pollock's right to procedural due process. We, accordingly, reverse the district court and order that Pollock be awarded nominal damages of $1.00 and reasonable attorney's fees.

Thus, the law in the Eighth Circuit appears to be that it is not really necessary that a party suing under Section 1983 for the violation of a liberty interest show that he has been defamed. The court seemed to say in those opinions that if the reasons given are defamatory in nature if not true, and if the employee is not given an opportunity to rebut them, even though such hearing would be fruitless, he is still entitled to nominal damages and attorney's fees if he is not afforded the opportunity to futilely try to clear his name at a name-clearing hearing.

In this case, the court has no difficulty in determining from the evidence that Hogue was terminated for stigmatizing reasons. As indicated above, most everyone in Scott County knew that "fraud investigators" were investigating him and the operation by him of the Scott County office. In addition, a mere glance at the exhibits received in this trial indicates that Hogue's personnel file is replete with charges of wrongdoing. In addition, Mr. Tudor testified that he believed, as a result of the investigation, that there was enough evidence of violations of the law that he referred the matter to the Prosecuting Attorney for the county and delivered to him all of his investigative files.

Thus, there appears to be little question but that, during

the course of Hogue's termination, stigmatizing reasons were given, and, thus, under the holdings discussed above, he was entitled to a due process hearing *before* his termination.

The court desires to make it abundantly clear that in so ruling the court has not, in any way, weighed the evidence as to the alleged wrongdoing of Hogue because the court does not believe that that is its "job." Instead, its function is to determine whether a hearing was necessary and, if so, whether an adequate one was provided. The evidence in relation to the charges made against Hogue are in great dispute, but it is clear that these charges were stigmatizing, requiring a hearing at which Hogue would have the opportunity to "clear his name." Whether the due process hearing required by the United States Constitution as interpreted by the Supreme Court in the cases discussed above was afforded Hogue will be discussed below.

Property Right.

The final circumstance arguably applicable to this case in which a hearing is required before termination is where the employee had a legally enforceable expectancy of employment either because of contract, express or implied, statute or ordinance, or by applicable personnel rules or regulations. The Policies And Procedures On Employee Grievance of the Department of Human Services was received as Defendants' Exhibit 2. Under the heading "Appeal of Termination" a specific procedure is set forth for an employee who believes he has been wrongfully terminated to follow. The lead sentence under this heading provides that an employee of the department "who feels he/she has been terminated unfairly will have the right to appeal, under the following formal procedure." Then, the procedure is set forth which culminated in an appeal before the Merit System Council discussed in more detail above. Thus, these provisions of the policies, especially when coupled with the provisions of Act 693 of 1983, clearly, in the

court's view, provided the employees of that department with the sufficient expectancy of continued employment to require that a due process hearing be held before termination.

In this regard, it appears to be clear from the evidence that all parties concerned, during the process of the termination, believed that Hogue would be afforded a meaningful hearing before the Arkansas Merit System Council Board. As already indicated, the Arkansas Supreme Court declared the act creating that board to be unconstitutional and, for this reason the hearing provided for by the act, and which all parties believe would be provided, was not provided. Thus, it appears clear that plaintiff Hogue had a property interest in his employment and that the state employer was, thus, required to provide him a due process hearing *before* termination, and if such was not provided, the plaintiff was deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Due Process Hearing.

The United States Supreme Court has held that no particular form of procedure is required, but that certain elements must be present. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). These include, at least (1) adequate notice, *Goss* v. *Lopez*, 419 U.S. 565 (1975); (2) adequate opportunity for a hearing, *Armstrong* v. *Mango*, 380 U.S. 545 (1965); (3) the right to introduce evidence, *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U.S. 349 (1936); and (4) the right to confront and cross-examine witnesses, *Wolfe* v. *McDonnell*, 418 U.S. 539 (1974).

The court has already delineated above the deficiencies in the "hearings" which were provided to Hogue. It would not serve a useful purpose to reiterate those deficiencies. Suffice it to say that the only hearing that might even arguably have been

sufficient was the one provided on October 29, 1980. But, for the reasons already discussed, that hearing was not meaningful in that the persons conducting it merely "threw the ball" to Hogue and his lawyer and said "it's your move," without providing them with any of the details necessary to provide a meaningful defense to the charges made. For a hearing to mean anything, and for an employee who is entitled to a due process hearing to have any chance to see that his rights are protected, he must know, at least in some detail, of the specifics of the charges made against him. He must know specifically what the charges are and who is making them so that he will have an opportunity to investigate the charges and rebut the allegations made by witnesses and other evidence. He must know what the person making the determination has on his mind and believes before he has any chance of convincing such person that the allegations made by others (unnamed) are not true. In fairness to all concerned in this matter, it appears obvious to the court that none of the parties believes that the meetings and hearing that were held were intended to be anything more than "going through the motions" so that a meaningful hearing could be held before the Arkansas Merit System Council Board at which witnesses could be subpoenaed and the case, in effect, tried. Unfortunately, as indicated, that board was in effect abolished by the Arkansas Supreme Court, but that fact in no way limit or removes the employer's obligation to provide a meaningful hearing providing the employee with the due process of law required by the United States Constitution.

In short, plaintiff Hogue was, under the cases discussed above, entitled to a due process hearing because both a liberty interest and a property interest were involved in his termination. He was not provided such hearing and is, thus, entitled to the remedies afforded by law.

Remedy.

What remedy is this court required to provide? The court believes that question was answered in *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973), the court whose decisions are binding on this one. In that case, the district court held that a fired teacher of a junior college was entitled to a name-clearing hearing and did not receive one at the time of his termination. However, the court further held that a hearing, at that late date, would accomplish nothing, and refused to order one. In reversing in part, the court of appeals stated:

> Wellner was improperly discharged because he was not accorded an appropriate hearing. His termination was therefore a nullity and he remains on the payroll until a proper hearing is held, at which time he may be retained or not reappointed. It is not within our province to speculate that after a proper hearing clearing his reputation the Board will recommend that Wellner not be reappointed, or that the appropriate official will not reappoint him to a similar teaching position. In any event, Wellner remains on the payroll and is entitled to receive the wages he will have earned until his name is cleared by proper Board action and the decision is properly made with respect to whether he will be reappointed. However, any award shall be reduced by interim earnings he may have derived from other employment.

Thus, as the court understands the holding in the *Wellner* case, *supra*, it must find, and does find, that Hogue shall be considered, for salary and fringe benefit purposes at least, to have been an employee of the Arkansas Department of Human Services from the time of his termination until he either is reappointed or discharged after the hearing required by law is afforded him.

Plaintiff prayed for compensatory damages in the amount of $1,000,000.00 and for punitive damages of the same amount. The court finds that the plaintiff has failed to meet his burden of proving any damage other than the damages caused by the loss of his job and the salary and fringe benefits flowing therefrom.

The court should make it abundantly clear that it has not attempted to weigh the evidence in this case and determine who is "right" and who is "wrong." In this respect, there is ample evidence in the record from which the person conducting the due process hearing required by law could find that many of the charges made against Hogue were true, and that he should not retain his job. On the other hand, there is evidence from which that person might conclude to the contrary. The court, by this decision, does not intend to say, or even intimate, what decision should be reached after the due process hearing is afforded. At such time, as *Wellner* points out, he may be retained or not reappointed and the employer may, at least as far as federal courts are concerned, decline to reappoint or retain him for any reason not prohibited by the United Stats Constitution or federal law. This court, and no other federal court, has the right to insure that the decision made after a proper hearing is "the right one." Instead, our only function in a case such as this is to insure that a meaningful due process hearing is afforded the employee before a liberty interest or a property interest is affected by the termination decision.

A separate judgment in accordance with this memorandum opinion will be concurrently entered.

This 5th day of April, 1985.

/s/ H. Franklin Waters
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1573

William Hogue, Appellee, v. Bill Clinton, Governor of State of Arkansas; Kenneth Whitlock; Barrett Toan; Gail Huecker; Ray Scott and Curtis Ivery, in their capacity as employees of the Department of Human Services of the State of Arkansas, Appellants.	* * *

Arkansas and various other present or former state employees, appeal from the district court's entry of judgment in favor of the plaintiff below, appellee William Hogue. Hogue alleged in his complaint that his discharge from his position as Director of the Scott County Office of the Arkansas Department of Human Services, Division of Social Services, deprived him of property and liberty in violation of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983. The district court held that Hogue had been deprived of both liberty and property interests without due process, and ordered that Hogue be considered to have remained an employee of the Department of Human Services for salary and fringe benefit purposes until he was provided a proper hearing. *Hogue* v. *Clinton*, 605 F. Supp. 1288 (W.D. Ark. 1985). We reverse outright the district court's judgment that Hogue had a property interest in continued employment. We also reverse the district court's holding as to Hogue's liberty interest, and remand for a determination of whether Hogue established the prerequisites for entitlement to a name clearing hearing.

I. FACTS

The facts surrounding Hogue's termination from his position with the Arkansas Department of Human Services are set forth in detail in *Hogue*, 605 F. Supp. 1289-94, and will be stated more briefly here. Hogue had been employed with the State Department of Human Services, an agency of the State of Arkansas, since 1962. For several years prior to his discharge Hogue was the Director of the Scott County Office of Social Services in Waldron, Arkansas (Scott County Office). The Scott County Office was responsible for administering several social services, including Medicaid, food stamps, and Aid to Families with Dependent Children (AFDC). Because of complaints received about services provided by the Scott County Office, an investigation was begun into Hogue's

administration of the office. After this preliminary investigation was conducted, a report listing alleged irregularities in Hogue's running of the Scott County Office was submitted to Barrett Toan, then Commissioner of the Division of Social Services.[1]

Upon receiving the report, Commissioner Toan directed the investigators to interview past and present employees of the Scott County Office to identify those cases in which mis-

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[1]The following charges were among those listed in the report submitted to Toan:

a. That Hogue certified clients for assistance that were not entitled to it, and directed other employees to do so;

b. That he allowed Peggy Keener, active in the campaign to elect Governor Bill Clinton, access to the confidential food stamp files, and provided her blank application forms for assistance and encouraged her to submit applications in behalf of persons in the county;

c. That Hogue instructed employees to certify, without question, all applications submitted by Ms. Keener, advising them that Ms. Keener had verified information and that it was unnecessary for them to do so;

d. That he instructed AFDC clients not to turn in child support money until told to by him;

e. That he instructed employees to leave out of the applications certain information that would make the particular person applying ineligible for assistance, and modified and caused caseworkers to modify information submitted by clients so that they would be eligible for benefits;

f. He instructed caseworkers to certify every client that they see because he did not want any pending cases;

g. That he does not require verification to certify clients, and that, in some instances, the information was verified after the case had been certified;

h. That he was involved in politics in violation of the rules of the agency and of state law;

i. That he instructed certain employees to follow and surveil other employees and report to him in relation to their off-duty personal contacts;

j. That, during previous elections, several clients discussed with Clyde Hawkins, former County Judge and County Sheriff, Hogue's threat to them that if they did not vote Hogue's way, he would close their welfare cases;

k. That he instructed employees of the office to give clients more deductions than they were eligible for;

l. That he intimidated employees by telling them that he "had the Commissioner in his pocket."

605 F. Supp. at 1290-91.

conduct had occurred. After these interviews were completed, the chief investigator submitted a report dated August 25, 1980 to Toan, listing nineteen alleged violations or irregularities in the running of the office.[2] Toan reviewed this report, came to the decision to terminate Hogue, and so notified Hogue by letter of September 2, 1980. The letter sent by Toan to Hogue describes in general terms the allegations in the August 25th report, but gives no specific information as to these charges.

On September 16, 1980, Hogue appealed his termination to Gail Huecker, Executive Director of the Department of Human Services, pursuant to the Department's grievance

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[2]The nineteen charges concerning Hogue's conduct listed in the report are as follows:

1. Instructs employees to violate policy to certify clients for assistance and issue food stamps.
2. Instructed AFDC clients to keep child support monies and utilize for other needs.
3. Interferes with the work of other agencies, causing some alienation.
4. Combining Social Service business with politics.
5. Demoralizing employees.
6. Utilizing office employees, state equipment and state materials in a political campaign.
7. Instructing the food stamp issuance officer to violate policy.
8. Instructing employee to utilize State time, equipment, and materials to prepare letters for private individuals.
9. Harassing an employee in front of the entire County Staff and visiting employees.
10. Instructing an employee to withhold a certain portion of service records requested by the Central Office.
11. Violation of policy during handling of child abuse incidents.
12. Committing conduct alienating other County Directors.
13. Violation of policy relative to foster homes.
14. Interfering with the ongoing investigation of Mr. Hogue's activities in Scott County.
15. Refusing to take action on possible fraudulent overpayments called to his attention.
16. Spends hours each week visiting in office with Peggy Keener and permitting her free access to the entire building.
17. Permitting Peggy Keener access to food stamp files.
18. Encouraging or threatening welfare clients to vote for Mr. Hogue's candidate.
19. Violating policy relative to voluntary medical travel.

605 F. Supp. at 1291-92.

procedure. Huecker responded by letter dated September 29, 1980 that she was overturning Toan's decision to terminate Hogue, reinstating him with back pay, and placing him on administrative leave. Huecker gave Commissioner Toan seven days to determine whether further action would be taken against Hogue. On October 2, 1980 a meeting was held in Toan's office, with Toan, Hogue, Hogue's attorney Mr. George Jernigan, Kenny Whitlock, Director of Program Operations, and Debby Nye, an attorney for Human Services, all present. The allegations against Hogue apparently were discussed at this meeting, although as the district court noted no record was made of the meeting.

Following this meeting, on October 7, 1980, Toan once again wrote Hogue, advising him that he was being terminated from employment effective October 10, 1980. Hogue appealed a second time to Huecker, and a second meeting was held on October 29, 1980 in the offices of Ray Robinson, Deputy Director of Human Services, who presided in Huecker's absence. A few days after this meeting, on November 3, Mr. Robinson informed Hogue that he had determined to uphold Toan's decision to terminate Hogue without reinstating back pay. Robinson also advised Hogue that he had the right to appeal to the Arkansas merit Council, a then-existing appeal procedure established for state employees by Act 693 of 1981 (Ark. Stat. Ann. §§12-3901 *et seq.*) (Supp. 1983). Although the parties scheduled a hearing before the Council, it was never held because a state trial court held Act 693 unconstitutional, a holding later affirmed by the Arkansas Supreme Court. *Patton* v. *Ragland*, 228 Ark. 231, 668 S.W.2d 3 (1984). Because the practical effect of the state courts' decisions in *Patton* was to abolish the Arkansas Merit System Council Board, Hogue was advised in August 1983 by Curtis L. Ivery, then Commissioner of the Arkansas Department of Human Services, that his internal appeal of the termination was exhausted and that his only alternative was to initiate civil litigation.

Hogue filed the present action on September 9, 1983.[3] The case was tried to the court on January 14 and 15, 1985, with the court rendering its decision on April 5, 1985. The court determined that because stigmatizing reasons were given in the course of his termination, Hogue was entitled to a due process hearing *before* his termination. *Hogue*, 605 F. Supp. at 1297. The court also found that Hogue had not received the name clearing hearing which he was due prior to his termination. *Id.* at 1298. Further, the district court held that Hogue had a "legally enforceable expectancy of employment" also sufficient to require a due process hearing before his termination. *Id.* at 1297. The court based its finding on the provisions of The Policies and Procedures on Employee Grievance of the Department of Human Services [Grievance Policies and Procedures] as well as the provisions of Act 693 of 1981. The court explained its finding as follows:

> Under the heading "Appeal of Termination" [in the Grievance Policies and Procedures] a specific procedure is set forth for an employee who believes he has been wrongfully terminated to follow. The lead sentence under this heading provides that an employee of the department "who feels he/she has been terminated unfairly will have the right to appeal, under the following formal procedure." Then, the procedure is set forth which culminated in an appeal before the Merit System Council ••• Thus, these provisions of the policies, especially when coupled with the provisions of Act 693 of 1981, clearly, in

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[3]In addition to claiming deprivation of his Fourteenth Amendment rights to liberty and property, Hogue also alleged in his complaint that he was terminated in violation of his First Amendment rights because of his refusal to aid Senator Rainwater in his re-election campaign. The district court found no basis for Hogue's argument that he was dismissed in violation of his First Amendment rights; this finding is not challenged on appeal.

the court's view, provided the employees of that department with the sufficient expectancy of continued employment to require that a due process hearing be held before termination.

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Id. The court additionally found that Hogue had been deprived of this property right without due process because he was never provided a meaningful hearing. Those hearings which did take place on October 2 and 29, 1980, were deficient, in the court's view, in that Hogue was given neither the specifics of the charges against him, nor the opportunity to refute those charges. *Id.* at 1292-93, 1298.

II. LIBERTY INTEREST

Appellants claim that the district court erred in concluding that Hogue had been deprived of a liberty interest without due process because he did not receive a pretermination name clearing hearing. In particular, appellants cite *Seal* v. *Pryor*, 670 F.2d 96, 99 (8th Cir. 1982), in support of their claim that Hogue was not entitled to such a hearing because he failed to prove that the stigmatizing information was false and that appellants made the information public. The district court noted, however, that since *Seal* v. *Pryor* this court has construed the Supreme Court's holding in *Carey* v. *Piphus*, 435 U.S. 247 (1978), to entitle a plaintiff to nominal damages for a failure to hold a due process hearing prior to termination even if the charges were true. *Hogue*, 605 F. Supp. at 1296-97; *see also Pollock* v. *Baxter Manor Nursing Home*, 716 F.2d 545, 547

(8th Cir. 1983) (per curiam) (*Pollock II*).[4] In *Payne* v. *Ballard*, 761 F.2d 491, 493 (8th Cir. 1985), this court stated that for the plaintiff to establish a liberty interest, "he must show that the reasons for discharge stigmatized him and that the defendants made the reasons public."

In this case, the district court found that Hogue was terminated for stigmatizing reasons, *Hogue*, 605 F. Supp. at 1297, a finding we conclude not to be clearly erroneous in light of the serious nature of the charges of misconduct against him.[5] The court, however, did not expressly find that the appellants

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[4]The court's opinion in *Pollock II*, reversing the district court's dismissal of the plaintiff's action, came on rehearing of the appeal after the original panel opinion was filed in *Pollock* v. *Baxter Manor Nursing Home*, 706 F.2d 236 (8th Cir. 1983) (per curiam) (*Pollock I*). In *Pollock I*, the panel affirmed the district court's dismissal of the plaintiff's action, with a dissent from Judge McMillian. In his dissent in *Pollock I*, Judge McMillian stated that the court's holding in *Seal* v. *Pryor* (which Judge McMillian authored), that the plaintiff had to prove that the stigmatizing information was false to establish a liberty interest, was "premised upon the fact that the public employee did not deny the substantial truth of the charges that led to his dismissal." *Pollock I*, 706 F.2d at 240. Judge McMillian discussed the Supreme Court's holding in *Carey* v. *Piphus*, which he stated "stands for the proposition that a plaintiff may recover nominal damages for [a] constitutional deprivation in and of itself." *Id.* at 238. Judge McMillian also quoted the Court's statement in *Carey* that:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. *Id.* at 240 (quoting *Carey* v. *Piphus*, 435 U.S. at 266 (citations omitted).

Based in part on this language in *Carey*, Judge McMillian concluded that a discharged public employee is not required to prove that the Government's stigmatizing charges are false to establish a liberty interest, but need only deny the substantial truth of such charges. *Id.* The reasoning of Judge McMillian's dissent in *Pollock I*, as to the impact of *Carey* v. *Piphus* on the need for a plaintiff to establish falsity was adopted in the majority opinion in *Pollock II*, 716 F.2d at 547, with Judge Henley dissenting. In the instant case, Hogue does allege that the charges against him were false.

[5]*See supra* notes 1 and 2.

made the charges against Hogue public.[6] Although it may be inferred that some dissemination had occurred from the court's statement that "most everyone in Scott County knew that 'fraud investigators' were investigating [Hogue]," the court made no finding as to whether appellants were responsible for any dissemination that occurred. Because a finding of publication is a prerequisite to demonstrating a liberty interest, *see Payne*, 761 F.2d at 493, we remand to the district court for determination of whether appellants publicly disseminated the charges againt Hogue.[7] Should the court find that the appellants did publicize stigmatizing charges, Hogue

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[6]In regard to whether Hogue had established a right to a name clearing hearing the court found as follows:

> In this case, the court has no difficulty in determining from the evidence that Hogue was terminated for stigmatizing reasons. As indicated above, most everyone in Scott County knew that "fraud investigators" were investigating him and the operation by him of the Scott County Office. In addition, a mere glance at the exhibits received in this trial indicates that Hogue's personnel file is replete with wrongdoing. In addition, Mr. Tudor testified that he believed, as a result of the investigation, that there was enough evidence of violations of the law, that he referred the matter to the Prosecuting Attorney for the county and delivered to him all of his investigative files.
>
> Thus, there appears to be little question but that, during the course of Hogue's termination, stigmatizing reasons were given, and, thus *** he was entitled to a due process hearing *before* his termination.

605 F. Supp. at 1297 (emphasis in original).

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[7]Of the three types of publication that the district court inferred took place here in its statement quoted *supra* note 6, only one is potentially sufficient to satisfy the publication requirement. That "most everyone in Scott County knew that 'fraud investigators' were investigating" Hogue does not establish that the defendants publicized the reasons for Hogue's discharge. Rather, this fact establishes only that the public knew about the investigation of Hogue; for all the public knew, Hogue could have been terminated for non-stigmatizing reasons. Also, that the charges against Hogue were referred to the county Prosecuting Attorney does not constitute publication because the information was given the prosecutor in his capacity as a public official. Further, the prosecutor's access to information about possible criminal conduct must not be so foreclosed. That "Hogue's personnel file is replete with wrongdoing," however, may be a sufficient publication if the defendants made that file available to prospective employers. *See Bailey* v. *Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985) and cases cited therein.

will have established that he possessed a right to a pretermination name clearing hearing. *Cleveland Board of Education* v. *Loudermill*, 105 S. Ct. 1487 (1985). The court should then determine truth or falsity of the charges against Hogue and award an appropriate remedy. Proof of a violation of his right to procedural due process will entitle Hogue to at least nominal damages and attorney fees, *see Pollock II*, 716 F.2d at 547, under the "Lawyer's Relif Act." *See Pollock II*, 716 F.2d at 549 (Henley, J., dissenting). Actual damages such as back pay, however, will be awarded only if Hogue can prove actual injury. *Bishop* v. *Tice*, 622 F.2d 349, 357-58, n.17 (8th Cir. 1980). Unless Hogue can establish that he suffered actual injury due to the failure to hold a pretermination name clearing hearing, we think an award of anything but nominal damages would be a windfall, not compensation. *See Carey* v. *Piphus*, 435 U.S. at 260.[8] We therefore direct the district court that if Hogue does establish that his right to a pretermination hearing was violated, he should not be awarded back pay prior to the district court's hearing, and should be awarded only nominal damages and attorney fees by the court unless he proves actual injury.

III. PROPERTY INTEREST

Appellants claim next that the court erred in holding that Hogue possessed a property interest in his employment entitling him to a pretermination due process hearing. Specifically, appellants assert that the district court failed to look to Arkansas state law to determine whether Hogue actually had a property right in employment, and that the court erred in holding that the Grievance Policies and Procedures along with Act 693 of 1981 secured such a right for

[8]Although the panel in *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973) awarded the plaintiff back pay until he was afforded a proper name clearing hearing, we decline to follow *Wellner* as it was decided prior to the Supreme Court decision in *Carey* v. *Piphus*, 435 U.S. at 266, requiring proof of actual injury for an award of actual damages.

Hogue. We agree with appellants that the court erred in determining that Hogue possessed a property interest in continued employment.

The Supreme Court stated in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), that: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." In *Bishoip* v. *Wood*, 426 U.S. 341, 344 (1976), the court stated that "[t]he sufficiency of the claim of entitlement must be decided by reference to state law." [In Arkansas an employee is generally terminable at will in the absence of an employment contract for a fixed term. *Griffin* v. *Erickson*, 277 Ark. 433, ___, 642 S.W.2d 308, 310 (Ark. 1982). That the employment is public rather than private does not alter the "at will" status of the employment, nor does a provision in the employment contract that an employee will not be discharged except for good cause.] *Id.*[9]

The district court ignored the Arkansas "employment at will" doctrine, instead looking to the Grievance Policies and Procedures. [We disagree with the district court that the Grievance Policies and Procedures, coupled with the provisions of Act 693 of 1981 providing an appeal before the Merit System Council, conferred a "sufficient expectancy of continued employment" upon Hogue to require a pretermination due process hearing. Grievance procedures that do not

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[9]Hogue contends in his brief that because the Arkansas Supreme Court has indicated that when presented with an appropriate case, it will reexamine the "at will" doctrine, *Gaulden* v. *Emerson Electric Co.*, 284 Ark. 149, ___, 680 S.W.2d 92, 94 (1984), appellants' reliance on that doctrine is misplaced. We are constrained, however, to apply Arkansas law as it exists without attempting to predict the evolution of that law. Further, the Arkansas Supreme Court's reference to reexamination of the "at will" doctrine was with employment contracts requiring good cause for discharge. *Id.*

establish any grounds upon which termination must be based do not in themselves create a property interest in employment. *Ziegler* v. *Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). *See also Cato* v. *Collins*, 539 F.2d 656, 660-61 (8th Cir. 1976) (Arkansas statutes outlining procedures, including the right to a hearing, for terminating a teacher's employment create no expectancy of continued employment).] As the Ninth Circuit has stated:

> Procedural requirements ordinarily do not transform a unilateral expectation into a constitutionally protected property interest. A constitutionally protected interest has been created only if the procedural requirements are intended to be a "significant substantive restriction" on the * * * decision making. If the procedures required impose no significant limitation on the discretion of the decision maker, the expectation of a specific decision is not enhanced enough to establish a constitutionally protected interest in the procedures.

Goodisman v. *Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) (citations omitted). *See also, Clemente* v. *Untied States*, 766 F.2d 1358, 1364-65 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 881 (1986) and cases cited therein. *Cf. Hewitt* v. *Helms*, 459 U.S. 460, 471-72 (1983) (state prison regulations governing administrative segregation of inmates create protected liberty interest through use of language mandating that such segregation will not occur absent "specified substantive predicates"); *Olim* v. *Wakinekona*, 461 U.S. 238, 249-50 (1983) (state prison regulations' lack of substantive limitation on official discretion creates no protected liberty interest on part of inmates).

Here, the Grievance Policies and Procedures merely provide an avenue of appeal for an employee discharged from the Department of Human Services; they do not restrict or even guide that agency's decision making by allowing for termination only under certain circumstances or for specific

reasons.[10] The dissenting opinion reads into the phrase in the Grievance Policies and Procedures stating that an employee "who feels he/she has been terminated unfairly will have the right to appeal, under the following formal procedures" a requirement that an employee can be terminated only for good cause. We disagree that this provision in the Grievance Policies and Procedures "may be properly construed to impose substantive restraints on the decision to terminate." The provision creates only an expectancy of review, not of continued employment; the procedures outlined place no significant substantive restrictions on the decision-making. Under Arkansas law, because he was not employed for a definite term, Hogue was an employee at will, subject to dismissal at any time without cause. We do not see, then, how Hogue could have harbored anything more than a unilateral expectation of continued employment, insufficient to entitle him to due process protection. *Roth*, 408 U.S. at 577. We therefore reverse the district court's holding that Hogue possessed a property interest in his employment entitling him to due process before he was terminated.

IV. CONCLUSION

That part of the district court's judgment holding that Hogue possessed a property interest in his employment is reversed. That part of the district court's judgment holding that Hogue was entitled to a name clearing hearing because his

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[10]We find the contrast drawn by Chief Judge Lay in his dissent, *infra* n.4, between the termination review provisions at issue in *Cato* and the Grievance Policies and Procedures in this case to be a distinction without a difference. No significant difference exists between review procedures that are always available to a particular terminated employee, as in *Cato*, and similar procedures available to an employee "who feels he/she has been terminated unfairly," as here. Presumably an employee initiates review procedures when the employee feels he or she has been terminated unfairly. That an employee can expect review upon termination does not in itself create a legitimate expectancy of continued employment.

liberty interest was violated is reversed and remanded for a determination of whether the stigmatizing reasons given during the course of his termination were publicly disseminated by appellants. If the district court finds that appellants did publicize the charges, the court should then determine the truth or falsity of the charges. Should the stigmatizing reasons against Hogue be determined to be true, Hogue will not be entitled to actual damages or reinstatement, but only nominal damages and attorney's fees.

APPENDIX C

LAY, Chief Judge, concurring in part and dissenting in part.

I respectfully dissent from the majority's holding that Hogue had no property interest in his employment under Arkansas law. I also write separately to clarify what I view as the limits of the majority's holding on the measure of Hogue's damages.

Property interest

I have great difficulty in rationalizing that a seventeen-year employment tenure with the State of Arkansas, protected by a state grievance procedure, fails to provide an employee with a sufficient expectancy of continued employment to invoke the requirements of the due process clause. There is no dispute that the existence of a property interest, or "a legitimate claim of entitlement," *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), in state employment is to be determined by state law. *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976). As the majority opinion points out, the traditional rule in Arkansas is that an employee is generally terminable at will when the term of employment is indefinite. *See Griffin* v. *Erickson*, 277 Ark. 433, 436-37, 642 S.W.2d 308, 310 (1982). Further, the majority makes clear that the Arkansas Supreme Court has never squarely declared its "employment at will" doctrine legally defunct. However, the state court has, in three recent opinions, declined to squarely apply the doctrine.[1] In the most recent of these cases, the Arkansas court declared "[w]e have *clearly stated* that we *will reexamine* our doctrine when we are presented with a case in which the contract of employment

[1]*See Gaulden* v. *Emerson Electric Co.*, 284 Ark. 149, 680 S.W.2d 92 (1984); *Jackson* v. *Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984); *Griffin* v. *Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982).

provides for discharge only for cause and the employee is discharged arbitrarily or in bad faith." *Gaulden* v. *Emerson Electric Co.*, 284 Ark. 149, 152, 680 S.W.2d 92, 94 (1984) (emphasis added).[2] Indeed, in *Jackson* v. *Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984), the court reversed a summary judgment in favor of the employer based on the traditional rule, so that the facts could be developed on whether an employee handbook created a contract of employment giving rise to a cause of action for wrongful discharge. Given the express language in *Gaulden* that the court will reexamine the issue, and the court's disposition in *Jackson*, it would seem clear that the Arkansas Supreme Court would hold that a contract of employment prohibiting discharge except for good cause creates an enforceable contract right in the employee, and thus an enforceable property interest, that the employee will not be discharged except for cause. In matters such as this we must decide state law in the same manner as the Arkansas Supreme Court would. In the alternative, although I feel that the state certification procedure should be used rarely by a federal appellate court,[3] any doubts on this issue would better be resolved by certifying the issue to the state supreme court for decision rather than by denying a seventeen-year employee his livelihood by speculating about what state law might be.

Further, it seems clear that the "Policies and Procedures on Employee Grievance of the Department of Human Services" creates such a contract betwen Hogue and his

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[2]The court did not reach the issue in *Gaulden*, despite the plaintiff's allegation that he had ceased to be an at-will employee upon completion of a probationary period and could be discharged only for cause. The court instead concluded that even if the employee was protected from arbitrary discharge, his employer had good cause to fire him. *See Gaulden*, 284 Ark. at 152, 680 S.W.2d at 94. The court also did not reach the issue in *Griffin*. Again the court decided that the employer's action was justified under a "good cause" standard. *Griffin*, 277 Ark. at 439-42, 642 S.W.2d at 311-13.

[3]*See Hatfield* v. *Bishop Clarkson Memorial Hospital*, 701 F.2d 1266, 1269-1273 (8th Cir. 1983) (Lay, C.J., dissenting).

employers. The grievance procedure states that an employee "who feels he/she has been terminated unfairly will have the right to appeal, under the following formal procedure." This provision may be properly construed to impose substantive restraints on the decision to terminate.[4] The term "unfair" in the employment context lends itself to an ordinary meaning of "without good cause." Thus, the appeal procedure here should be interpreted to both create a contract between Hogue and his employer that he will not be terminated except for cause, and to transform a "mere procedure" into a substantive expectancy. I would therefore affirm the district court's conclusion[5] that Hogue had a property interest in his job and hold that, if pretermination procedures were lacking, he is entitled to damages until such time as a proper hearing is held. The proper measure of those damages is the issue to which I now turn.

Measure of damages

I agree with the majority's precise holding on the damages available to Hogue if he proves that the manner of his termination deprived him of *liberty*. As the majority points out, under *Carey* v. *Piphus*, 435 U.S. 247 (1978), an employee alleging that a discharge deprived him or her of liberty may recover only nominal damages, unless it can be shown that a pretermination hearing would have changed the result or the

[4]This construction of the grievance procedure is not inconsistent with *Cato* v. *Collins*, 539 F.2d 656, 660-61 (8th Cir. 1976). The right to hearing provisions in the teacher employment law challenged in that case, triggered when a teacher is not renewed by the school board, nowhere mention perceived unfairness as a predicate to the teacher's use of the procedures. Thus, those procedures, in contrast to the grievance procedure at issue here, did not imply that the hearing process was intended to encompass review of the substantive reasons for a teacher's termination. *See Cato*, 539 F.2d at 660-61 n.6 (setting forth hearing requirements).

[5]The majority fails to give deference to the district court's determination of what state law would be. This violates our long standing rule that special weight should be given to the district judge's construction of state law.

plaintiff can prove actual damages such as emotional distress.[6] At issue in *Carey* was the measure of damages to be awarded two students who had been suspended from school without the benefit of presuspension procedures. The Court concurred in the court of appeals' holding that "if [the school officials] can prove on remand that '[the students] would have been suspended even if a proper hearing had been held' then [the students] will not be entitled to recover damages to compensate them for injuries caused by the suspensions." *Carey*, 435 U.S. at 260 (quoting *Piphus* v. *Carey*, 545 F.2d 30, 32 [7th Cir. 1976]). Moreover, the Court held that, absent proof of actual injury, the students could recover only nominal damages for the violation of their due process rights *per se*. *Carey*, 435 U.S. at 262-64. The Court rejected the students' argument analogizing the deprivation of procedural due process to defamation *per se*, in which the plaintiff need not produce evidence of actual injury since substantial damage is presumed to occur. *Id.*

As the Court also acknowleged in *Carey*, the proper measure of damages for a constitutional wrong must be evaluated against the nature of the particular constitutional right in question. *Carey*, 435 U.S. at 264-65. "[T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* Thus, an analysis of the reach of the *Carey* damage rules must take into account the nature of the constitutional injury sustained by the suspended students.

The Court in *Carey* does not clearly state whether the interest implicated by the students' suspensions was a liberty or property interest; school suspensions are apparently treated as

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[6]We recognized the applicability of the *Carey* damage rules to discharge cases in *Bishop* v. *Tice*, 622 F.2d 340 (8th Cir. 1980), an employment case alleging a deprivation of liberty. *See Bishop*, 622 F.2d at 357-58 n.17.

a hybrid of the two. *Compare Goss* v. *Lopez*, 419 U.S. 565, 574 (1975) (viewing suspensions as a deprivation of property) *with id.* at 574-75 (liberty interest implciated); *see Paul* v. *Davis*, 424 U.S. 693, 710 (1976). What does seem clear, though, is that the injury inflicted by a short school suspension is more in the nature of a deprivation of liberty than property; that is, more akin to an infliction of a stigma than a deprivation of a continued entitlement to a state benefit. A brief suspension, like a short illness, does little to impair the overall value of a student's education. The principal harm to a student arising from a short suspension lies in the possibility that the student's teachers may begin to view and treat the student as a troublemaker. Thus, the students' attempt in *Carey* to analogize their damages to those applicable to defamation seems entirely appropriate.

By contrast, expulsion from school, or having the schoolhouse door barred entirely imposes no less a stigma but also disparages a student's fundamental entitlement to a state-provided benefit, namely, education itself. *See Plyler* v. *Doe*, 457 U.S. 202, 223 (1982) (barring class of students from free public education imposes a "lifetime hardship," "stigma of illiteracy will mark [children] for the rest of their lives"). In such a case, the full panoply of injunctive relief, including school enrollment of students by preliminary injunction pending the outcome of litigation, has properly been awarded. *See Plyler* v. *Doe*, 458 F. Supp. 569, 575 (E.D. Tex. 1978).

The same distinction between liberty and property interests controls the remedies available to public employees who are discharged in violation of procedural due process. When, as here, insufficient predeprivation procedures result in an alleged invasion of protected liberty interests, the *Carey* damage rules apply. When, however, procedural due process is violated such that an employee's property interest in employment is invaded, *Carey* is inapposite and an employee should be entitled to equitable relief in the amount of backpay

consistent with our holding in *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153, 157 (8th Cir. 1973). Drawing such a distinction between liberty and property interests for purposes of determining the appropriate remedy is not mere sophistical logic chopping. A name-clearing hearing and a "cause" hearing perform quite different functions and describe quite different constitutional claims. In a name-clearing case, there is generally no issue that the employee could have been discharged for any reason; rather, at issue is whether the reasons publicized for the discharge were stigmatizing and false. *See generally Codd* v. *Velger*, 429 U.S. 624 (1977). Thus, in any event the employee had no constitutional entitlement to the job itself, but only to the retention of his or her good name for purposes of seeking reemployment. *See Roth*, 408 U.S. at 573 n.12 (once name-clearing hearing is held employer may remain free to deny employment). The proper measure of damages for a name-clearing case thus focuses on proven harm to the reputation, not loss of the job. *See Owen* v. *City of Independence*, 560 F.2d 925, 939-40 (8th Cir. 1977), *rev'd on other grounds*, 445 U.S. 622 (1980). By contrast, a "cause" hearing centers on whether the employee has a continued claim to the job itself. Since an employee alleging a deprivation of property is at bottom urging his or her entitlement to continued employment, the measure of damages should thus focus on the value of the job, not the value of the employee's reputation or other measure of actual damage.

There is language in *Carey* that suggests that the Court might not have recognized this distinction at the time *Carey* was decided. At footnote 15 of the *Carey* decision, the Court notes with disfavor several cases from the fourth and fifth circuits that awarded a backpay measure of damages for public employees discharged for cause but without procedural due process. *Carey*, 435 U.S. at 260 n.15. This language is dicta only, and seemingly is put to rest by *Cleveland Board of*

Education v. *Loudermill*, 105 S.Ct. 1487 (1985).[7] The unequivocal message of *Loudermill* is that due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interests in his [or her] employment." *Loudermill*, 105 S.Ct. at 1493 *quoting Roth*, 408 U.S. at 569-70. This rule clearly imposes on public employers an obligation to retain an employee on the payroll until a pretermination hearing satisfying the *Loudermill* notice and hearing requirement is conducted.[8] Significantly, the Court observed "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay*." *Loudermill*, 105 S.Ct. at 1495 (footnote omitted, emphasis added).[9] To effectively bar recovery of back pay damages by the application of the *Carey* rules would make a mockery of the requirement of a pretermination hearing since, without the deterrent of a back pay award, no incentive remains for the employer to do anything more than provide only a post-termination hearing.[10]

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[7]In *Okeson* v. *Tolley School District No. 25*, 760 F.2d 864 (8th Cir. 1985), a panel of this court, of which I was a member, did apply the *Carey* damage rules in an employment property interest case. *See Id.* at 869. Although *Okeson* was decided one month after *Loudermill*, we did not cite or rely on *Loudermill* in reaching our decision. Had the *Loudermill* case been argued to us I believe our panel would have decided this issue differently in *Okeson*.

[8]The Court in *Loudermill* recognized that in some settings, post-deprivation hearings will satisfy due process, citing *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) and *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908). *Cleveland Board of Education* v. *Loudermill*, 105 S.Ct. 1487, 1493 n.7 (1985). The cases cited by the Court in no way undermine the absolute application of the *Loudermill* rule to employment discharge cases. *Ewing* and *North American Cold Storage* dealt with the constitutionality of legislation permitting immediate seizure of consumer products believed to be misbranded or dangerous to the public health.

[9]In contrast, the immediate suspension of a student, without pre-deprivation notice and hearing, does not violate due process when the student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." *Goss* v. *Lopez*, 419 U.S. 565, 582 (1975). This distinction again highlights the disparate constitutional interests at stake in school and employment contexts.

[10]The ills of this shortcoming are amply set forth in *Loudermill* and need no repetition here. *See Loudermill*, 105 S.Ct. at 1494.

In fashioning remedies for constitutional harms, we are charged with the fundamental obligation and responsibility of protecting constitutional rights. In another context, the Court has stated that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980) (municipalities not entitled to qualified immunity defense). The Court in *Owen* quoted with approval our decision in *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973), where we stated that the reasonably certain prospect of back pay awards "provide[s] the spur of catalyst which causes employers * * * to self-examine and to self-evaluate their employment practices." *Id.* at 379, *quoted in Owen*, 445 U.S. at 652 n.35. *Loudermill* requires no less. I would thus hold that an employee who proves a property deprivation based on having been terminated without a *Loudermill* pretermination hearing be awarded back pay from the time of discharge until a proper hearing is held.

A true copy.

Attest: Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1573-WA

William Hogue,	*
	*
Appellee,	* Appeal from the United States
	* District Court for the Western
vs.	* District of Arkansas.
	*
Bill Clinton, etc., et al.,	*
	*
Appellants.	*

Appellee's petition for rehearing has been considered by the Court and is denied.

July 15, 1986

APPENDIX E

EXHIBIT 2

STATE OF ARKANSAS
Department of Human Services
Division of Social Services
P.O. Box 1437
Little Rock, Arkansas 72203

September 2, 1980

Mr. William Hogue
P.O. Box 38
Gravelly, Arkansas 72838

Dear Mr. Hogue:

This is to advise you that I am hereby terminating your services with the Division of Social Services effective September 2, 1980, under the authority of Arkansas Statutes Annotated, Section 83-107 for cause as is necessary for the efficient performance of duties prescribed under the Public Welfare Act.

This is to further advise you that if you feel that you are aggrieved by reason of this discharge you may, within fifteen (15) days, apply to the Merit Council for a hearing.

The good causes are enumerated herein and I consider any one of these causes to be a just and proper cause for your termination. These reasons include:

I. Inefficiency. (1) You were inefficient in your office in carrying out the policies of the Division of Social

Services in that you instructed employees to violate policy to certify clients for assistance and in the issuance of food stamps, (2) you instructed AFDC clients to keep child support moneys and in reporting the receipt of these moneys, (3) you failed to take proper action in adjusting a client's case when you were aware they were receiving support moneys that were not considered in their case, (4) you interfered with work of other agencies causing some alienation, and (5) you violated policy during the handling of child abuse cases.

II. You failed to perform your assigned duties. Your duties included following manual policy and seeing that the employees that you supervised also followed this policy. (1) In direct violation of these assigned duties you actually instructed employees to certify clients without proper verification of eligibility criteria, (2) you failed to properly adjust cases, when clients informed you, or you determined that the client was receiving support moneys, and (3) you interfered with the work with other agencies instead of cooperating with these agencies.

III. You were inadequate in the performance of your assigned duties. (1) You were inadequate in properly instructing your employees to follow rather than to violate policy, (2) to properly follow the IV-D policy of support, (3) to properly cooperate with other agencies, (4) instead of soliciting the cooperation of other employees you harassed an employee in front of the entire county staff, (5) you instructed an employee to withhold a certain part of a service record requested by the Central Office, (6) you violated policy in handling child welfare cases, and (7) you violated foster home policy as you saw fit.

IV. You were guilty of conduct unbecoming a public employee. (1) By interfering with the work of other agencies, (2) by harassing an employee in front of the entire county staff, (3) by committing conduct which alienated other county directors, (4) by interfering with an investigation ordered by my office, and (5) you instructed employees to utilize state time, equipment and material to prepare letters for private individuals.

V. You are guilty of misconduct. (1) In instructing employees to violate policy, (2) in instructing AFDC clients to keep support money, (3) in interfering with the work of other agencies, (4) in combining Social Services business with political activities, (5) in demoralizing employees, (6) in utilizing office employees, state equipment and state material in a political campaign, (7) in instructing the food stamp issuance officer to violate policy, (8) in instructing employees to utilize state time, equipment and material to prepare letters for private individuals, (9) in harassing an employee before the entire staff, (10) in instructing an employee to withhold certain portions of a service record requested by the Central Office, (11) in violation of policy during the handling of a child abuse case, (12) in committing conduct that alienated other county directors, (13) in violating policy relative to foster homes, (14) in interfering with the ongoing investigation of your county, (15) in refusing to take action on possible fraud overpayments called to your attention, (16) in spending unnecessary time with non-agency personnel and permitting unauthorized persons access to Social Services materials and to offices under your control.

VI. You are guilty of a violation of Act 568 of 1979 regarding political activities in that you combined Social Services business with politics during working hours, you

utilized office employees, state equipment and state material in a political campaign.

VII. —You violated the Federal Hatch Act by combining Social Services business with political activities during working hours, you utilized office employees, state equipment and state material in a political campaign and you encouraged or threatened Social Services clients by using your office to force clients to vote for a candidate of your choice.

Based on evidence that I have received from case records, clients, and employees, I have found that you have flagrantly violated policy and your termination is necessary in the best interest of the Division of Social Services.

/s/ Barrett Toan
Commissioner

APPENDIX F

EXHIBIT A

DIVISION OF SOCIAL SERVICES
Seventh and Main Streets
P.O. Box 1437
Little Rock, Arkansas 72203

Office of the Commissioner

August 12, 1983

Mr. William F. Hogue
P.O. Box 36
Gravelly, Arkansas 72838

Re: Meeting of August 8, 1983

Dear Mr. Hogue:

The purpose of this correspondence is to respond to your request for a review of the circumstances and rendered decision regarding your termination of October 10,1980.

After careful deliberation of your assertions, a review of a voluminous dcumentation file, and interviews with available persons having first-hand knowledge of your termination, it was my observation that it appears:

1) You were terminated for cause;

2) An inordinate amount of time and staff were devoted to addressing your termination, from both the Divisional and Departmental levels;

3) You have been afforded due process in your efforts to resolve your problem; and

4) You did appeal the Division's decision to terminate as well as the Department's subsequent decision to uphold the termination to the Merit System Board.

It is therefore my decision, based upon the above factors, that the Division will not alter its decision, or take any further actions regarding your termination. In light of the recent court ruling asserting that the Merit System Board is without jurisdiction to proceed in those cases which were prior submitted for disposition, your internal appeal of this matter is officially exhausted.

If you should desire to pursue this matter, it seems that your only alternative is to initiate civil litigation. You should be advised that the Division does not wish to become a party in a lawsuit; however, I personally see no other option at our disposal for amicably resolving your allegations of impropriety on behalf of the Division regarding your termination.

I deeply regret that my decision offers no immediate resolution of your problem, but I feel it inappropriate for me to substitute my judgment for that of my predecessors.

/s/ Curtis L. Ivery, Ed. D.
Commissioner

CLI:clm

cc: Ray Scott, Director, Department of Human Services
Doyle Green, EEO Officer, Department of Social Services

APPENDIX G

ARKANSAS STATUTES ANNOTATED

Public Welfare Act

83-107. Duties of the commissioner. — The Commissioner shall serve as the executive and administrative officer of the State Department [Division] and shall be secretary of the State Board. He shall prepare and submit to the State Board for its approval an annual budget of all funds necessary to be appropriated by the Legislature for the State Department for the purposes of this act, including in such budget an estimate of Federal funds which may be allotted to the State by the Federal Government for the purpose of the State Department [Division]. He shall prepare annually a full report of the operations and administration of the State Department [Division] together with recommendations and suggestions, and such report shall be submitted to the Governor not later than two [2] months after the close of the fiscal year. The Commissioner shall appoint and may discharge, subject to the provisions of the rules and regulations established, such personnel as may be necessary for the efficient performance of duties prescribed in this act and shall supervise and direct their work. He shall administer and make effective the rules and regulations governing the personnel.

The Commissioner of Public Welfare [Social Services] is hereby empowered to select and appoint such advisory committees, with the advice of the State Board, as may be deemed expedient, necessary or desirable for the specific functions of the department.

The Commissioner may discharge, subject to the provisions of the rules and regulations established, such personnel

from the State, district or county level or any employee of the State Welfare Department [Division of Social Services] for cause as may be necessary for the efficient performance of duties prescribed in this act. Any person aggrieved by reason of discharge may, within fifteen [15] days, apply to the Merit Council for a hearing. [Acts 1939, No. 280, §6, p. 665; 1951, No. 228, §1, p. 521.]

APPENDIX H

ARKANSAS STATUTES ANNOTATED

STATE DEPARTMENTS — ORGANIZATION

5-912. . . . (3) The Director of the Department of Social and Rehabilitative Services, with the advice and consent of the Governor, shall appoint the heads of the respective divisions. All other personnel of the Department of Social and Rehabilitative Services shall be employed by and serve at the pleasure of the Director of the Department of Social and Rehabilitative Services, provided that nothing in this Act [§§5-901—5-922] shall be so construed as to reduce any right which an employee of the Department of Social and Rehabilitative Services shall have under any civil service or merit system.

(2)

Supreme Court, U.S.
FILED
NOV 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-635

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM HOGUE ..... *Petitioner*

vs.

BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS; KENNETH WHITLOCK; BARRETT TONE; GAIL HUECKER; RAY SCOTT AND CURTIS IVERY, IN THEIR CAPACITY AS EMPLOYEES OF THE DEPARTMENT OF HUMAN SERVICES OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

J. STEVEN CLARK
ATTORNEY GENERAL
STATE OF ARKANSAS
Counsel of Record
201 E. MARKHAM
LITTLE ROCK, AR 72201
(501) 371-2007

E. JEFFERY STORY
ASSISTANT ATTORNEY GENERAL
201 E. MARKHAM
LITTLE ROCK, AR 72201
(501) 371-2007

Attorneys for Respondents

ARKANSAS LEGISLATIVE DIGEST, INC.

13P

QUESTION PRESENTED

WHETHER A COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT WAS BASED ON A QUESTION OF LAW OR OF FACT; IF BASED ON FACT, WERE THE MANDATES OF FEDERAL RULE OF CIVIL PROCEDURE 52(a) AND *ANDERSON V. CITY OF BESSEMER, NORTH CAROLINA*, 470 U.S. ____ 105 S.Ct. 1504, 84 L. Ed. 2d 518 (1985) IGNORED.

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OPINION BELOW

The Opinion of the United States District Court for the Western District of Arkansas, reported at 605 F.Supp. 1288 (1985), the opinion of the United States Court of Appeals for the Eighth Circuit (unreported to date), and the dissenting opinion of Chief Judge Lay (unreported to date) are reprinted as Appendices A, B and C, respectively to the Petition for Writ of Certiorari beginning at page 12.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1254(3) as the basis of this Court's jurisdiciton.

STATUTORY PROVISIONS INVOLVED

The petition has adequately set forth the statutory provisions involved.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-635

WILLIAM HOGUE ..... *Petitioner*

vs.

BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS; KENNETH WHITLOCK; BARRETT TONE; GAIL HUECKER; RAY SCOTT AND CURTIS IVERY, IN THEIR CAPACITY AS EMPLOYEES OF THE DEPARTMENT OF HUMAN SERVICES OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Petitioner was employed by an agency of the State of Arkansas known as the State Department of Human Services, Division of Social Services, from September 1, 1962 until his termination on October 10, 1980. Petitioner was director of the Scott County Office of Social Services located in Waldron, Arkansas.

During the summer of 1980, before the Democratic Primary had been held, then State Senator Gene Rainwater received from Bud Rice, a State Representative from the Waldron area, a letter he had received from two individuals who were residents of Waldron. The letter alleged impro-

prieties in relation to petitioner's administration of Social Services programs.

W. A. Tudor, at that time the Director of Investigations-Medicaid Fraud for the Division of Social Services received the letter and began an investigation of the allegations. On August 11, 1980, Tudor submitted a report to Barrett Toan, Commissioner of the Division of Social Services, setting forth allegations of wrongdoing. These allegations are set out in the District Court's Opinion at App. #1 in App. "A" of Petitioner's Motion.

Subsequent to the aforementioned report, Commissioner Toan directed Tudor and his investigators to interview employees and former employees in order to identify as many suspect cases as possible. After these interviews were completed Tudor submitted a report dated August 25, 1980 to Commissioner Toan. The second report contained 19 allegations of wrongdoing, which are set forth at App. #2 at App. "A" of Petitioner's Motion. After reviewing the reports, Commissioner Toan made the decision to terminate plaintiff. On September 2, 1980, Toan wrote petitioner advising him that he was being terminated as of September 2, 1980, and cited reasons why.

On September 11, 1980, Toan informed petitioner that a grievance proceure existed at the Department of Human Services. Petitioner appealed to Gail Huecker, Director of Department of Human Services, on September 16, 1980 and requested a review of the termination. Petitioner was reinstated with back pay and placed on administrative leave on September 29, 1980 by Gail Huecker. Ms. Huecker allowed Commissioner Toan seven (7) days to make a final determination as to whether future actions would be taken against petitioner.

A hearing was held in the Office of Commissioner Toan on October 2, 1980. The purpose of the hearing was to discuss

the allegations against Hogue. On October 11, 1980, Toan wrote petitioner advising that he was being terminated from his employment effective October 10, 1980. Petitioner appealed to Gail Huecker a second time on October 13, 1980, and another hearing was held on October 29, 1980, in the offices of Ray Robinson, Deputy Director of Human Services.

By letter dated November 3, 1980, petitioner was advised that his termination would be upheld. The letter advised petitioner that if he did not agree with the decision that he could appeal to the Arkansas Merit Council under their rules and regulations. While the Merit Council appeal was pending, the State enabling statute creating the Council was declared by a State Court to be an unconstitutional delegation of Legislative authority. That decision was affirmed by the Arkansas Supreme Court in the consolidated cases of *Patton, et al.* v. *Ragland* and *Charles* v. *Gordon, et al.*, 282 Ark. 231, 668 S.W.2d 3 (1984).

By letter dated August 12, 1983, petitioner was advised by Curtis L. Ivery, who had succeeded Barrett Toan as Commissioner of Social Services, that in effect, his termination would not be reviewed and that the Division would not "take any further action regarding your termination." The letter advised petitioner that he had exhausted his internal appeal and if he desired to pursue the matter he might initiate civil litigation.

The petitioner filed suit under 42 U.S.C. §1983 alleging that he had been deprived of both liberty and property without due process of law. The case was tried to the Court on January 14 and 15, 1985. The District Court held that petitioner had a property interest in continued employment by applicable personnel rules and regulations. The Eighth Circuit Court of Appeals reversed the District Court by finding that "under Arkansas law, because he was not employed for a definite term, Hogue was an employee at will, subject to dismissal at any time without cause." The Court of Appeals' Opinion is found at Appendix "B" of Petitioner's Motion.

REASONS FOR DENYING THE WRIT

It is noted in Rule 17 of the Rules of the Supreme Court that review on a Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefor. The rule states that the Court's discretion may be exercised when a federal court of appeals has rendered a decision in conflict with applicable decisions of this Court. Also, this Court's discretion may be exercised when a federal court of appeals has decided a federal question in a way in conflict with a state court of last resort.

Petitioner has cited Fed. R. Civ. P. 52(a), and *Anderson* v. *City of Bessemer, North Carolina*, 470 U.S. ___ , 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) in support of his argument that the Eighth Circuit has substituted its judgment for that of the district court without finding that the district court's decision was clearly erroneous. Such reliance on *Anderson* and Rule 52(a) is misplaced. Whether petitioner had an expectation of continued employment by virtue of respondents' policies and procedures on employee grievances is a question of law not of fact.

To assert a property interest sufficient to trigger the application of procedural due process guarantees, reference must be made to state law. *Bishop* v. *Wood*, 326 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Under Arkansas law, an employee is generally terminable at will in absence of an employment contract for a fixed term. *Griffin* v. *Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982).

The Eighth Circuit stated that the district court had ignored the Arkansas "employment at will doctrine," instead looking to the grievance policies and procedures:

We disagree with the District Court that the grievance

> policies and procedures, coupled with the provisions of Act 693 of 1981 providing an appeal before the Merit System Council, conferred a "sufficient expectancy of continued employment" upon Hogue to require a pre-termination due process hearing. Grievance procedures that do not establish any grounds upon which termination must be based do not in themselves create a property interest in employment. *Zeigler* v. *Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). See also *Cato* v. *Collins*, 539 F.2d 656, 660-661 (8th Cir. 1976) (Arkansas Statutes outlining procedures, including the right to a hearing for terminating teachers' employment create no expectancy of continued employment).

App. "B" at p. 44 of Petitioner's Motion.

The Eighth Circuit proceeded to cite the Ninth Circuit as follows:

> Procedural requirements ordinarily do not transform a unilateral expectation into a constitutionally protected property interest. A constitutionally protected interest has been created only if procedural requirements are intended to be a "significant, substantive restriction" on the *** decision making. If the procedures required impose no significant limitation on the discretion of the decision of the decision maker, the expectation of a specific decision is not enhanced enough to establish a constitutionally protected interest in the procedure.

Goodisman v. *Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) (citations omitted).

Petitioner has referred to a statement by Gail Huecker which stated in essence that petitioner's due process rights would be guaranteed during the grievance determination

period. Such a statement does not confer a property interest in employment upon petitioner. Respondents have never denied that Ms. Huecker made such a statement. However, the statement was made in the context of the existing grievance procedures. As a matter of law, the grievance procedures do not amount to a "mutually explicit understanding," as required by *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), that would create a significant expectation of continued employment. As the Eighth Circuit stated:

> Here, the grievance policies and procedures merely provide an avenue of appeal for an employee discharged from the Department of Human Services; they do not restrict or even guide that agency's decision making by allowing for termination only under certain circumstances or for specific reasons.

App. "B" at p. 45 Petitioner's Motion. Petitioner did not bargain for a grievance procedure, he had no input whatsoever. Grievance procedures were unilaterally established by respondents.

The Eighth Circuit has properly applied *Bishop* v. *Wood*, *supra*, *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and cases from the Arkansas Supreme Court. *Griffin* v. *Erickson*, *supra*, clearly stands for the proposition that if an employee is not employed for a definite term, he is subject to dismissal at any time without cause. In light of the existing law, petitioner possessed no more than a unilateral expectation of continued employment, which in and of itself is insufficient to entitle him to due process. *Roth*, 408 U.S. at 577.

CONCLUSION

This Court need not grant certiorari because no conflicts exist.

Respectfully submitted,

J. STEVEN CLARK
ATTORNEY GENERAL
STATE OF ARKANSAS
Counsel of Record
201 E. MARKHAM
LITTLE ROCK, AR 72201
(501) 371-2007

E. JEFFERY STORY
ASSISTANT ATTORNEY GENERAL
201 E. MARKHAM
LITTLE ROCK, AR 72201
(501) 371-2007

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, E. Jeffery Story, do hereby certify that I have served copies of the foregoing by mailing same by U.S. Mail, postage prepaid, to Thorp Thomas, Attorney at Law, 112 West F Street, North Little Rock, AR 72116; and Bob Scott, Attorney at Law, 1611 N. Main, North Little Rock, AR 72116, this 14 day of November, 1986.

E. Jeffery Story